

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office

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**MEDIATION QUESTIONNAIRE**

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are **not** confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

9th Circuit Case Number(s): 16-15303

District Court/Agency Case Number(s): 5:08-cv-04119-LHK (N.D. Cal)

District Court/Agency Location: U.S. District Court, Northern District of California, San Jose Division

Case Name: Northstar Financial Advisors, Inc. v. Schwab Investments, et al.

If District Court, docket entry number(s) of order(s) appealed from: ECF Nos. 229, 260, and 261

Name of party/parties submitting this form: Plaintiff-Appellant Northstar Financial Advisors, Inc.

Please briefly describe the dispute that gave rise to this lawsuit.

This putative class action arises from investments in the Schwab Total Bond Market Fund (the "Fund"). The stated fundamental investment policy of the Fund, only changeable by shareholder vote, was to seek to track the Lehman Brothers Aggregate (U.S.) bond index and to not invest more than 25% of Fund assets in a single industry. Plaintiff alleges that defendants caused the Fund to deviate from the fundamental investment objective without a shareholder vote and that investors were damaged thereby.

Briefly describe the result below and the main issues on appeal.

This is an appeal from the District Court's Orders dated October 5, 2015 (ECF 229) and February 23, 2016 (ECF 260), and Final Judgment dated February 23, 2016 (ECF 261). The principal issues raised on appeal are (i) whether the District Court erred in its October 5, 2015 Order by granting defendants' motion to dismiss plaintiffs' claims for breach of contract, third party breach of contract, and breach of the duty of good faith and fair dealing on the grounds that the claims are preempted by the Securities Litigation Uniform Standards Act ("SLUSA"), and (ii) whether the District Court erred in its February 23, 2016 Order by granting defendants' motion for judgment on the pleadings concerning plaintiffs' claims for breach of fiduciary duty on the grounds the claims are pre-empted by SLUSA.

Describe any proceedings remaining below or any related proceedings in other tribunals.

Final Judgment in favor of the defendants was entered on February 23, 2016 (ECF 261). At the time Final Judgment was entered, discovery was ongoing. ECF 260 also denied plaintiffs' motion for class certification as moot. There are no directly related proceedings. There was a separate SEC enforcement action commenced by the SEC primarily with respect to an unrelated Schwab mutual fund (the YieldPlus fund) that resulted in a disgorgement

order and plan of allocation being approved with respect to the YieldPlus fund and the Total Bond Market Fund by Hon. William J. Alsup. See SEC v. Charles Schwab Investment Management et al., CV-11-0136 (N.D. Cal). That disgorgement order is at most an offset against damages in this action.

There are three appeals currently pending before the Ninth Circuit that concern similar SLUSA preclusion issues to those on appeal here. Hampton v. Pacific Investment Management Co. LLC, No. 15-56841 (9th Cir.) is an appeal from an order of the Central District of California dismissing claims for breach of contract, breach of trust, and breach of the covenant of good faith and fair dealing arising from a mutual fund exceeding its stated investment restrictions. Fleming v. The Charles Schwab Corp., No. 16-15179 and Lim v. Charles Schwab & Co., Inc., No. 16-15189 are two appeals from an order of the Northern District of California dismissing claims for, among other things, breach of contract and breach of fiduciary duty arising from the Schwab entities' stating they would route orders to a venue that would execute the trade at the best price possible for the customer, and in fact entered into a contract to route all orders to a single venue, UBS Securities LLC. To plaintiffs' knowledge, no briefs are scheduled to be filed in these appeals until May 9, 2016.

Provide any other thoughts you would like to bring to the attention of the mediator.

Prior to the dismissal of the action, the parties had engaged in some document discovery and defendants had an opportunity to take depositions of the named plaintiffs and two related persons. Moreover, plaintiff had filed its affirmative motion for class certification and defendants had filed their opposition to that motion. Accordingly, although significant discovery and motion practice remain in the action (assuming a reversal by the Ninth Circuit), the posture of the case is such that the parties are in a reasonable position to have meaningful settlement discussions.

Any party may provide additional information *in confidence* directly to the Circuit Mediation Office at [ca09\\_mediation@ca9.uscourts.gov](mailto:ca09_mediation@ca9.uscourts.gov). Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

## CERTIFICATION OF COUNSEL

I certify that:

a current service list with telephone and fax numbers and email addresses is attached

☒ (see 9th Circuit Rule 3-2).

I understand that failure to provide the Court with a completed form and service list

☒ may result in sanctions, including dismissal of the appeal.

Signature

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

Counsel for

**Note:** Use of the CM/ECF system is mandatory for all attorneys filing in this Court, unless they are granted an exemption from using the system. **To file this form electronically** in CM/ECF, complete the form, and then print the filled-in form to PDF (File > Print > PDF Printer/Creator). Then log into CM/ECF and choose Forms/Notices/Disclosure > File a Mediation Questionnaire.

**MEDIATION QUESTIONNAIRE – LIST OF COUNSEL**

***Northstar Financial Advisors, Inc. vs. Schwab Investments, et al.,***  
**9th Circuit Case Number: 16-15303**

Plaintiff-Appellant in this action, Northstar Financial Advisors,

Inc., is represented by the following counsel:

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 1, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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